UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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JONATHAN CORBETT,

Plaintiff,

v. 22 Civ. 5867 (LGS)

KATHLEEN HOCHUL, LETITIA JAMES, KEVIN BRUEN, ERIC ADAMS, KEECHANT SEWELL, and INSPECTOR HUGH BOGLE,

Defendants.

Remote Conference
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New York, N.Y.
November 29, 2022
2:30 p.m.

Before:

HON. LORNA G. SCHOFIELD,
District Judge

APPEARANCES

JONATHAN CORBETT
Attorney for Plaintiff (pro se)

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL
Attorney for Defendants Hochul, James, and Brown
BY: TODD A. SPIEGELMAN

NEW YORK CITY LAW DEPARTMENT
Attorney for Defendants Adams, Sewell, and Bogle
BY: NICHOLAS R. CIAPPETTA

(Case called)

THE COURT: Hello, and thank you for convening.

We're here to discuss primarily one matter, which is the plaintiff's motion for a preliminary injunction. We also have the defendants' proposed motions to dismiss, and I will discuss that after we talk about the plaintiff's motion for injunctive relief.

I should start out by saying that I have reviewed your papers, and it's my hope to issue an oral ruling at the conclusion of our conference, but I did want to give both sides an opportunity to speak particularly to some of the more difficult issues.

So, Mr. Corbett, it's your motion. There are issues I'm particularly interested in, but if you would like to say a few words by way of introduction, I'll let you do that first.

MR. CORBETT: Good morning, your Honor.

I don't think I have too much to say as far as an introduction. I'm sure the Court has thoroughly reviewed the papers and understands my position, so I'll just be available for questions.

THE COURT: Okay. Well, let me start with a question, then.

So with respect to the social media and references requirements, I'm really focused on the standing issue. I am pretty persuaded that you don't have standing to raise those

issues, but I did want to give you a chance to address that if there's anything you would like to say. And I have read your papers on the subject, but that's my question and that's my first concern.

MR. CORBETT: Yes. I think it does make it tougher with the timing thing, candidly. I hear the government's arguments. The issue will certainly arise eventually whether it is on this application or on renewal. It's something that licensing officers may take into consideration on their own, even if state law doesn't require them to quite yet. I think it's a real issue. And whether it's going to be next month or two years from now, it's going to come up, it's going to be something that directly injures my interests. Immediacy is certainly much harder in this case, especially when they're not even processing applications at the moment.

THE COURT: I'm glad you have a realistic view of that issue. And I don't doubt that it might come up some time, but perhaps not in your case because a renewal application, of course, only follows an original license that you're seeking to renew, and we don't even have that yet.

So why don't we move on, then, if you don't mind, to the training requirement, which I think is much more of a question. I'd like to start with the standing issue, but let me ask the city defendants——so that's Mr. Spiegelman, I think. It's your position that the plaintiff doesn't have standing to

raise that issue. It seems to me that perhaps he does. So if you'd like to say anything on that subject, I'd be pleased to hear it. And again, I have read the papers.

MR. SPIEGELMAN: Judge, I should say I represent the state defendants, but we did argue that the plaintiff doesn't have standing on this issue. I just reiterate under binding law, including the Second Circuit's decision in *Libertarian Party*, the cognizable legal injury doesn't arise until the application has been denied, and Mr. Corbett's application has not been denied. So he may obtain standing at some point, but he doesn't have it yet. I think the point that there is --

THE COURT: If I could just interrupt for a second, what about futility? I take your point that the application hasn't been denied, but futility is a separate basis for standing.

MR. SPIEGELMAN: Well, yes. In the same case, the Second Circuit was clear that objection or antipathy to the law is not futility, and that is what we have here. Plaintiff Corbett thinks the laws unconstitutionally won't submit -- they won't participate in the training, but that's simply not enough. He still has to go through the training and be denied to have standing. In *Libertarian Party* there was no training requirement then, but there were other requirements that applicants had to pay fees and they had to submit affidavits for good moral character and proper cause. Even with all that,

they didn't have standing. Just the filling out of the application, the affidavit, the fees, that wasn't the injury; the injury was when there are denied, and so too here.

THE COURT: I understand your argument.

Mr. Ciappetta, apologies for my confusing who your clients were. Would you like to be heard on that issue?

MR. CIAPPETTA: Yes, just briefly.

I think we argued along the same lines. I will just add that the plaintiffs in his papers and his complaint explicitly said that the training is a waste of his time. And, to me, that doesn't establish futility. Whether or not he feels that the course is going to be beneficial to him or not, standing can't be based upon that. And I would submit that the training is useful. It's 16 hours, plus two as a practical component, and there's New York relevant laws. So even though he may be a licensee elsewhere, the training would be relevant, but that's going on to different issue for now.

THE COURT: Right. I mean, I think the point is not so much whether the training would be helpful, but the real question is whether it's futile and whether futility confers standing here. It's not just that he has antipathy towards the training requirement, but he refuses to do it. And it's not something that is in the control of some other person or that may change as circumstances in the world change, it's something he refuses to do.

So I guess my question is: Why doesn't that make the whole application process futile? I mean, why do I have to insist that his application be denied because he has refused to take the training before I hear this?

MR. CIAPPETTA: I think even if you look at the recently decided *Bruen* case, your Honor, in that case, you have an application and a denial. That denial, as Mr. Spiegelman said, is the quintessential hook for the standing. And in those cases, under that theory in the *Bruen* case, the person said, Well, I can't establish proper cause so I'm not even going to bother applying. And that wasn't -- I think the Court there would have said that there was a standing issue as well.

So we saw in that *Bruen* case you had an application, you had a denial, and that was the basis for the federal lawsuit. Here, we don't even have that. His application remains pending; there's no decision on it yet. And you could have that situation --

THE COURT: So here's a question.

MR. CIAPPETTA: Yes.

THE COURT: Is there any reason to think that he would be granted the license that the requirement for training can be waived or would be waived?

MR. CIAPPETTA: Not as of this moment.

And, your Honor, as you reviewed my papers, I did mention the fact that local licensing officers do have

discretion with respect to the training. They can evaluate going back five years to see whether other experience may have substituted for it. In reply, the plaintiff did say that he hasn't taken any training in the last five years, so I do acknowledge that that probably would mean that it couldn't be established elsewhere. Though, I do think that the department deserves a chance to look at the application.

But, certainly, there's a lot of situations with respect to training where people may have established that otherwise. So we wouldn't want them to say, Oh, it's futile, I don't think that I have the five years, the five-year look-back wouldn't help me. I think that's a decision for the department to make. The department should be able to review it and it shouldn't be based on whether the license applicant says, I can't meet it or not.

Here, it might be a clearer question based on his statement in his affidavit. But in a lot of circumstances, it might not be so clear. Also, if "I won't be able to be licensed" was the standard, I think there would be a whole host of other situations where people would be running to court without letting the NYPD process their applications. For example, they could say, Oh, I have a criminal conviction in my background, that means they'll deny me, I'm not going to even bother applying; or, I have an order of protection against me that most likely means I'll be denied, I won't apply. So I

think in those situations we'll have an efficiency of court issue.

THE COURT: A big difference is that the application has been filed here. I guess it depends on what the circumstances are, but if an application has been filed and in one of those other examples you gave and it's clear from the statute that the applicant hasn't met a requirement or condition for licensing, I think there's a fair question -- and maybe not even question, a fair conclusion about futility. But let's go on to the merits of the training requirement.

Mr. Corbett, I know that you're *pro se* here, but you are an attorney, but it's your license for a firearm that is at issue here. So with regard to the constitutionality of the training requirement, it's your position that it's not Constitutional and after the *Bruen* case it's clear that the inquiry here, the proper inquiry, is a historical one. And the question is whether historically comparable regulations or burdens were or have been imposed, and I didn't see any evidence attached to your motion on that issue, and so I was wondering what you have to say about that.

MR. CORBETT: Yes, your Honor.

On that issue, the burden is on the government to demonstrate that there is a historical analogue, not on the challenger. I think that we can easily see what the current state of the law is in all 50 states. I think that we can look

back over the last century——and this is not something that requires a ton of research——an 18-hour training course has never been required. The historical analogue that the government attempts to make is that of military service, trying to, again, bring back the word militia in the Second Amendment that has been resounding made a nullity by the Supreme Court at this point. One could own a firearm and not be eligible for the militia in the 1800s. There simply is no historical analogue that the government has pointed to. Given that it's not my burden, I think that the government clearly has not carried theirs.

THE COURT: Let me interrupt.

I agree with you that ultimately the government has the burden here of showing that there is a historical analogue, but on your motion for preliminary injunction you have the burden of showing a likelihood of success on the merits. So that means that if they present me with evidence, which they have, and you don't then you haven't carried your burden. And, frankly, even if I simply viewed it as their having the burden even on your motion, if they put in evidence and you don't put in evidence then they have carried their burden, unless I discredit all of their evidence. And I don't have any countervailing evidence to do that with.

MR. CORBETT: I think it's not so much discrediting their evidence as finding that it's not legally relevant. The

evidence that they submitted simply is not analogous to the current rules. Unless they've submitted evidence that is actually on point, they haven't submitted any evidence that is competent to carry their burden.

THE COURT: Well, I mean, by the terms itself in the Second Amendment, and even the discussion in the *Heller* case, isn't the right to bear arms sort of intimately related and derived from the whole concept of a militia, but broadly defined, as *Heller* does?

MR. CORBETT: There are many people who do believe that there is a connection between their right and militia membership. However, the Supreme Court has been clear that these are individual rights that we have that are unconnected with militia membership. So I don't think at this point, based on current Supreme Court law, that that argument can save the government's rule here.

THE COURT: Okay. Let me hear from one of the defendants. Why don't we start with Mr. Spiegelman again.

MR. SPIEGELMAN: I'd be happy to.

Your Honor cited *Heller* and the text in the Second Amendment itself, and *Heller* is clear that part of the Second Amendment right is the proper use of handguns. And even before we get to this historical analysis, the Supreme Court found "shall issue" licensing regimes would have training requirements to be presumptively Constitutional. And the

Concealed Carry Improvement Act transforms New York into a "shall issue" regime, especially on the training requirement. If the plaintiff -- if the applicant completes the 18 hours, the licensing officer will issue them a license and so this is now -- New York is now like 31 other states.

And I think if you look at the plaintiff's papers carefully, it doesn't actually contend that a training requirement in and of itself is unconstitutional, it's just the fees he speculates might be incurred or the 18 hours, but that's kind of a slender read to stand on. I mean, New York may be the highest, but it's not the highest by much, right? Illinois is at 16. New Mexico is at 15. Do the extra two hours make the whole requirement unconstitutional? No. If you take plaintiff's arguments to its natural conclusion, the highest state is always unconstitutional you just keep knocking down the hours, which doesn't make a whole lot of sense.

And the historical analogues are on point. I won't belabor what we say in our papers, but the militia training was much more extensive than 18 hours. This was training every year, six times a year, in some states, six hours a day until you were 45, not once every three years for 18 hours. And the overarching purpose was firearms safety, even for the militia. They don't want you shooting yourself with the gun. And, of course, the burden is much less here.

I think we're on firm ground with the training

requirement. Even the *Antonyuk* court, which looked at the law pretty skeptically, upheld the training requirement, didn't really say anything about the hours, just put that down as fine. And plaintiff's argument on the fees is based on speculation.

I guess the last thing I'd say about that is, historically, militia members incurred a lot of costs. They paid for their own equipment. They didn't get reimbursed for travel time and so on. So the fees, whatever they are, are not out of step, historically.

I think I'll leave it at that.

THE COURT: Okay. Thank you.

Mr. Ciappetta, would you like to be heard? And I'm particularly interested in the exorbitant fees argument that Mr. Corbett makes.

MR. CIAPPETTA: I'm sorry, your Honor. I had to unmute myself.

THE COURT: Okay.

MR. CIAPPETTA: Yes, I will address the fees.

First, I do want to talk about the *Bruen* test itself for a moment. I won't reiterate what the State said, but our analysis was slightly different, and it goes to your question on the burden.

While eventually the burden is to justify the regulation based on a tradition and establishing a tradition in

regulation, there's a first step in *Bruen*, and that shouldn't get lost here, and that's very important. The Court made very clear that there's a step-one analysis that needs to take place. And at that step one, you first have to determine whether the proposed conduct is even covered by the Second Amendment. That's significant. That's not something to just speed through as the plaintiff does.

In *Bruen*, I think the question is fairly easy so they didn't spend need to spend a ton of time and make decision on it, but it is analysis that needs to occur in every single case. And here, we argue that the proposed conduct is owning or possessing a firearm without obtaining training.

THE COURT: Well, wait. I mean, I understand that that's your argument. And the reason I didn't pursue it is because it seems to me that it begs the argument and it conflates the right to bear arms with any regulatory requirements that might be imposed on it. And so, I guess I have trouble accepting your argument.

MR. CIAPPETTA: Okay. But I would say then -- I mean, I assume the plaintiff is trying to propose that the proposed conduct is a right to carry. But I would suggest, your Honor, then, if that's the case, that would make the first step of the *Bruen* analysis virtually irrelevant, because at every single regulation that would be challenged in any regard somebody would say, Oh, my proposed conduct is the right to carry.

So, for example, if they challenge the NYPD licensing scheme in its entirety, you could say, Oh, that's my right to carry. I would suggest that there, it's the right to carry without a license; and here, it's the right to carry without undergoing any training. And we say that conduct isn't protected.

THE COURT: Is there any binding case law? I know it's hard since *Bruen* is so recent, but is there any binding case law or even persuasive case law that adopts your approach for defining step one?

MR. CIAPPETTA: Not in the Second Circuit, but there have been decisions in district courts elsewhere. I believe there's a couple decisions in Texas that spend a great deal of time. Even the decision that came out of Texas, your Honor, dealing with whether individuals 18 to 21 years of age have a right to carry. And in that case, and in also some of the cases challenging sections of United States Code as to whether a felon can carry or not, there's substantial analysis in those cases. In fact, I have one in front of me. I believe it's *United States v. Antonio Perez-Gallan*. And there, was whether -- if you were subject to a court order, whether that violates *Bruen*. And eat each of these levels, they're conducting quite a bit of analysis at that first step. So I don't think it's just something that is always going to be the cause, or even in certainly this case, it's just the right to

possess gets you through the *Bruen* step one. I think it's much more complicated than that.

THE COURT: Okay. Did you want to say anything else about the constitutionality of the training requirement?

MR. CIAPPETTA: Yes.

Likewise, with respect to the training, whether you look at it in step one or in step two, I think the Supreme Court has already tacitly approved training. They mentioned in Footnote 9 of the *Bruen* decision that there are long-standing, presumptively lawful regulatory measures, and this seems to be one of them. They specifically talk about a training course.

THE COURT: I had a question about that because, frankly, it wasn't entirely clear to me from the *Bruen* decision. Where does that leave us with the historical analysis? I mean, they tell us the test is a historical analysis, but does that mean that they've implicitly done this historical analysis around training and come to that conclusion or what?

MR. CIAPPETTA: Yes, that's what I believe, your Honor. I believe that over the course of *Bruen* and over the course of *Heller* that the Supreme Court identified these long-standing, presumptively lawful regulatory measures, and they've already done that analysis for us. For example, also in the category of dangerous arms they did that analysis already and they already determined how, going forward, you

would look at a dangerous weapon; it would be whether -- you wouldn't need to do that historical analysis, they've already done it. For example, with respect to felons, with respect to the sensitive locations that they've identified——schools, courthouses——you wouldn't need to do those again. So if somebody challenges them, the Supreme Court has already done that analysis, correct.

So, for example, and as applicable to this case, these long-standing presumptively lawful regulatory measures, one of those is where there are narrow definite and objective standards. And this is certainly a narrow, definite, and objective standard. All you need to do, as Mr. Spiegelman said, is look and see whether the person has a certificate of completion for the training.

THE COURT: Again, I'm trying to understand this.

So narrow -- I don't remember the language -- certain and objective standards that -- not any narrow and objective standards I presume would survive, it also has to have a historical analogue, right?

MR. CIAPPETTA: I would argue no. If they're narrow and objective, I believe the Supreme Court has already upheld those presumptively.

THE COURT: Okay.

MR. CIAPPETTA: Particularly with respect to training and course work.

THE COURT: Okay. I mean, it seems to me you're suggesting an overly broad reading, but that is not relevant here since we're talking about training requirements. But, okay, go ahead.

MR. CIAPPETTA: So here, as I said, this is very objective, right? I mean, you either take the course and you get your certificate of completion or you don't.

Going back to your point -- which is a broader point, right? It really involved whether there's the exercise of discretion upon the licensing officer. And with respect to a training program, and this is a training requirement, there's no discretion that needs to be exercised if he sees the certificate, that's a checkmark, that application requirement has been completed.

THE COURT: So you're suggesting that any narrow requirement imposed on an applicant that is objective and not discretionary would survive?

MR. CIAPPETTA: Potentially. I mean, I don't think I need to make that argument in this particular case.

THE COURT: Right. Okay.

MR. CIAPPETTA: But in the appropriate case, I would certainly be willing to make that argument, and I believe it would be a colorable one.

THE COURT: Okay. You're right. It's completely academic here. So why don't we talk about some aspect that

isn't as academic. And I'm still interested in the fees argument.

MR. CIAPPETTA: Yes. I think that that's also speculative. The Supreme Court had some language in a footnote that talked about cost. I think that talks about numerical dollar cost, hard costs, not soft costs, which is the time involved to take a course, the number of hours in the course, because --

THE COURT: And what did we know about the standard of how much is too much?

MR. CIAPPETTA: That's a good question. We don't know that. And I do think that's something that that's going to have to be developed in case law. I do think that while perhaps it's a different standard for the Second Amendment, there is case law dealing with fees and other context, and we've litigated this in different aspects where the fee has to be proportionate to the amount of work done in connection with the application. So the administrative fee couldn't be $10,000, for example, because there's not $10,000 worth of work done to review the application.

Here, I think the fee is only $350. I can tell you, certainly, that there's a tremendous amount of work that goes into the review of an application, and even more so since the CCIA was passed on September 1., because now you have a lot of different things to review that you didn't have to review

before.

THE COURT: Okay. Let me hear from Mr. Corbett.

Mr. Corbett, it's your motion, and I think you know the issues that I'm interested in. I'll let you have the last word if there's anything else you'd like to add, or anything that's been said that you want to address.

MR. CORBETT: Thank you, your Honor.

There is ambiguity in the *Bruen* case as to whether certain objective licensing measures need to pass a historical analogue or not. But to the extent that the Supreme Court implied some kind of exception, the exception was not just for any objective measures, but specifically for those that prevent dangerous or non-law abiding people with having guns. So essentially there's some kind of tailoring there, there's some kind of balancing test, if we're going to assume that there's no historical analogue required for those things.

THE COURT: I mean, but there is. There's a very strong historical analogue for dangerous or unsavory people possessing guns.

MR. CORBETT: Definitely.

The papers that I filed don't dispute that a training requirement of some kind is Constitutional or that fees of some kind are Constitutional; the question is whether or not they're excessive. And I think right now we have a few things that go towards it being excessive.

Number one, the total cost of licensure is going to be over $1,000. The government can call that speculation, but they haven't put forth any speculation of their own or any evidence to disprove it. It seems pretty clear from any research that I've done and presented to the Court that it's going to be over $1,000. It's also going to be dozens of hours.

THE COURT: Wait. Have you put any evidence that says that?

MR. CORBETT: Well, I put the actual costs that the government charges for their licensure. But the real issue is that the training courses are going to be substantial.

If we look at training courses in other states that are smaller in duration, you'll see that they run 5, 6, 7, $800. There's no way in New York, one of the most expensive places in the country, we're going to escape anything like that. But even if it was just $500 for the licensing course, that's in addition to the $350 for the application, in addition to the $88, or whatever it is, for the fingerprints, in addition to the time one has to take to complete all of these steps. So really, this does deny the ordinary citizen the ability to get this license without trading extreme hardship.

On the other hand, the government really hasn't demonstrated what good this course is going to do over shorter courses that are common in other states. It just doesn't seem

that there's any kind of justification other than an attempt to just make it more difficult.

THE COURT: But that doesn't make it unconstitutional. I guess, at what point do you say it reaches the level where it is so excessive that it's unconstitutional? What's the measure of that?

MR. CORBETT: It's going to be hard to put an exact number on that. And the Supreme Court has always been very good at putting these kind of vague standards and letting the district courts kind of figure it out. And it's unfortunate we have to do that now with very little guidance, however the licensing costs now will be the highest in the country, there's no doubt about that. The training number of hours will be the highest in the country, there's no doubt about that either. So if there is a training requirement that can be challenged in this country, it is New York's new requirement.

I wanted to add one more thing, just as a general outlook for this case. The government makes a lot of arguments that make sense. They're logical and, in a vacuum, they are persuasive. I would urge the Court to consider whether the Supreme Court, as it's currently made up, will consider them the same way.

The government's, for example, arguing that the burdened right is not just the right to bear arms, but the right to bear arms without a license and so forth. These are

questions that the Supreme Court would not even come close to agreeing with the government on. There is an argument that is made there, it is a logical argument, but it is an argument that is foreclosed by *Bruen*, and it is an argument that will go nowhere. The militia is not connected to this debate anymore. Comparing training requirements to militia training requirements is simply not a historical analogue that the Supreme Court will accept. And I would urge the Court to see it as that.

THE COURT: Okay. I am prepared to rule, in that case. Let me begin with the legal standard, which I know was a matter that the parties disputed.

I'm quoting now: "A party seeking to stay government action taken in the public interest pursuant to a statutory or regulatory scheme must establish (1) a likelihood of success on the merits, and (2) irreparable harm in the absence of an injunction." *Evergreen Association, Inc. v. City of New York*, 740 F.3d 233 at 245, Second Circuit 2014; *accord Citizens United v. Schneiderman*, 115 F. Supp 3d 457 at 462, S.D.N.Y. 2015. "A presumption of irreparable injury flows from a violation of Constitutional rights." *We The Patriots USA Inc. V. Hochul* 17 F.4th 266 at 294, Second Circuit 2021.

I know that this is a less demanding standard than at least what I believe the City advocated for, but I'm not sure that the mandatory injunction standard has been applied in this

context. And the quotation that I read from *Evergreen* is explicitly addressed to a party seeking to stay government action taken pursuant to a statutory or regulatory scheme. So for the purpose of my analysis here, I'm adopting the less demanding standard, meaning less demanding standard imposed on the plaintiff seeking relief.

So in terms of my analysis, just to cut to the chase, I'm denying the request for preliminary injunction. With respect to the social media and reference requirements, plaintiff has not established a likelihood of success on the matters, and, specifically, that is on the standing issue. In order to have standing to sue, a litigant must have suffered an injury in fact *Spokeo, Inc. v. Robins*, 578 U.S. 330 at 338, 2016. "To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized in actual imminent, not conjectural or hypothetical." *Id.* at 339, *accord TransUnion, LLC. v. Ramirez*, 141 Supreme Court 2190 at 2200, and the year is 2021. "A concrete injury must be *de facto*; that is, it must actually exist; it must be real, and not abstract." *Spokeo*, 578 U.S. at 340.

As I understand from our oral argument, I think Mr. Corbett is realistic about this argument and understands the impediment that the requirement of imminence imposes. Here, I find, for the purposes of this motion, that the

plaintiff lacks standing to challenge the social media and reference requirements because he applied for his license in April 2022, and the two requirements we're talking about did not apply to applications that were made before September 1, 2022. So by the terms of the statute, those requirements don't apply to plaintiff, so he cannot show injury in fact from these requirements.

Plaintiff looks to the future and argues that these requirements would apply to any renewal application. I'm not persuaded by this argument. First, any renewal application is at least three years away, and that is not actual or imminent. Second, any renewal application is hypothetical because there is not yet any license to renew. So for that reason, I find that plaintiff has not established a likelihood of success on the two challenges, the social media requirement and the references requirement, because he lacks standing.

Let me turn then to the training requirement. I conclude that the plaintiff has not shown a likelihood of success on the merits of this challenge. I'm assuming without deciding that he is likely to be able to show that he has standing to challenge the training requirement. "In order to challenge the New York firearm licensing laws, a person must either have applied for and been denied a license or make a showing that his or her application would have been futile." *Libertarian Party of Erie County v. Cuomo*, 970 F.3d 106 at 116,

Second Circuit 2020, abrogated by *Bruen* on other grounds.

Plaintiff here has filed an application and the training requirement by its terms applies to his application. He has not taken the required training. He states that he has no intention of taking the required training and he hasn't had any training in the last five years. Nothing in the statute suggests that the training requirement can be waived or that it's discretionary. And so on these facts, it seems likely that the plaintiff can show that his application is futile and likely to be denied. It is sufficient to establish injury in fact and, therefore, standing.

Onto the merits of the training requirement, the plaintiff has not shown a likelihood of success in showing that the requirement is unconstitutional. "The Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense." *New York State Rifle and Pistol Association, Inc, v. Bruen*, 2111 at 2125, and the year is 2022. "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2129 and 30.

"This historical inquiry will often involve reasoning by analogy." Id. at 2132. "Analogical reasoning requires only that the government identify a well-established and

representative historical analogue, not a historical twin." *Id.* at 2133. "Whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are central considerations when engaging in an analogical inquiry. Id."

So as a threshold matter, I find, for the purposes of this motion, that the Second Amendment's plain text covers the conduct in question, that is to own and carry a handgun in public. However, plaintiff has failed to show a likelihood of success on the merits. Defendants ultimately have the burden of proof on this issue. And here, they have made a sufficient showing without any contrary evidence from plaintiff that the training requirement is consistent with the Nation's historical tradition of firearm regulation.

The State defendants attach and quote a New York law called an Act for Regulating the Militia of the State of New York, passed in 1780, which shows that the belonging to a militia was something that was required basically of every able-bodied man between the ages of 16 and 44, and that was the State militia. And those men were required to be enrolled and to bear arms and at least four times a year——by the way, I think it's four and not six——be "called out to be well and sufficiently exercised trained and disciplined for their instruction and improvement." That is at Docket 16-8 at page 3.

State defendants also provided a similar New Jersey law which states, "That the militia, on the days of exercise, may be detained under arms on duty in the field any time not exceeding six hours." Based on these sources and evidence in the record, the training requirement appears to be consistent with, and even more lenient than, the training requirements of the 18th and 19th centuries. Although the plaintiff disputes that the militia is an appropriate analogue, it is in that context that the Second Amendment was adopted and, in that context, that men were expected and did carry arms.

The plaintiff identifies several ways in which the training requirement is different from its historical analogue. As I said, I think that argument is unpersuasive because defendants, as *Bruen* says, need not identify an historical twin. Plaintiff also argues that the training requirement is unconstitutional because of exorbitant fees and also an argument about excessive time, but the plaintiff has not offered any evidence of what the fees actually will be. And the New York State militia statute makes clear that individuals were required to soldier significant costs in connection with their bearing arms. So it seems to me there's ample historical precedent not only for the training requirement but imposing costs in connection with the bearing of arms and licensure on the applicants.

So for these reasons, because the plaintiff has not

established a likelihood of success on the merits of challenging the training requirement, I am denying the motion for preliminary injunction.

Mr. Corbett, I understood from your letter to the Court that you intend to appeal; is that right?

MR. CORBETT: Your Honor, as to the Court's holding on the training requirement, yes, that is a likely outcome.

THE COURT: Okay. So given that, I think your suggestion to wait on any motions to dismiss makes sense. And so I'm going to grant the plaintiff's application to stay any motions to dismiss pending appeal and resolution of the preliminary injunction order.

My plan is to issue a very brief written order basically referencing my reasoning here on the record. We have a court reporter. There will be a transcript. And I'm also going to stay discovery and any other proceedings until after the preliminary injunction motion or appeal is resolved.

Anything else we should be talking about, Mr. Corbett?

MR. CORBETT: Your Honor, I just wanted to give notice that there may be a motion to amend the complaint to include the time that it has taken to process this application. We're approaching the eight-month mark now. The City has shown no intention of rapidly processing my or any other application that's been submitted, which will become a new Constitutional issue. So I just wanted to put that out there. There will be

an interlocutory appeal, the Court will retain jurisdiction, and that motion for leave to amend may be pending.

THE COURT: Okay. Mr. Spiegelman, do you want to comment? Is there any opposition to the motion to amend or to the proposed timing of the motion to amend, which I presume is relatively soon?

MR. SPIEGELMAN: I think I need to see the motion to say what the -- and talk it over with my clients to say what the State defendants' position on it would be.

As to timing, I guess it's when plaintiff wants to file it.

THE COURT: All right. But do you agree that I would have jurisdiction to consider it and rule on that motion?

MR. SPIEGELMAN: I think you would.

THE COURT: I think you would, too, but I just wanted to make sure there's no objection that.

So, Mr. Ciappetta, what is the position of the City defendants as to any motion to amend? Or do you want to confer with your clients?

MR. CIAPPETTA: We would have to confer.

I guess I do have one question for the Court though. Assuming he makes that motion and it's granted, then would I assume our time to respond to that or move would likely be stayed as well?

THE COURT: Yes, that's true. And if I don't

explicitly say so then, just ask me in a letter and I'll endorse it to make that clear and on the record.

MR. CIAPPETTA: We likely wouldn't have an objection. I do need to speak with my client. We're fairly permissive on letting people amend their complaint, as long as it's not too long into the litigation or it wouldn't involve discovery. So my inclination would be not to oppose it.

THE COURT: Okay. So, Mr. Corbett, I have a requirement for premotion letters. What I suggest you do is make a premotion letter and just lay out your argument fully and attach the proposed amended complaint to your letter. And what I suggest you do is do a compare so that we can see the changes as compared to the original complaint, and then the defendants can respond, likewise, in a letter and either say that they don't oppose or put their arguments there. Then I'll just decide on the letters; I won't take full briefing. So if you would comply with my individual rules in that way, that would be great.

MR. CORBETT: Your Honor, if I may ask, you have separate rules for *pro se* litigants and non. I'm happy to follow the non-*pro se* litigant rules; is that acceptable?

THE COURT: That is preferable. Thank you for raising that.

Okay. I assume there's nothing else. So unless anyone speaks up quickly, we're adjourned.

Thank you. Have a good afternoon, gentlemen.

(Adjourned)